

2014 WL 5391086 (D.C.Super.) (Trial Motion, Memorandum and Affidavit)
Superior Court of the District of Columbia,
Civil Division.

German BERNAL, Plaintiff,

v.

IGLESIA EVANGELICA APOSTOLES Y PROFETAS EF 2:20, Defendant.

No. 2012 CA 006324 B.
January 10, 2014.

Memorandum of Points and Authorities in Support of Plaintiff's Motion for Summary Judgment

[John F. Pressley, Jr.](#), #379716, 7600 Georgia Avenue, N.W., Suite 412, Washington, D.C. 20012, (202) 723-8800, for plaintiff.

Judge [Rankin](#).

Calendar 7

Preliminary Statement

1. This is a case arising out of a dispute between two factions of Iglesia Evangelica Apostoles Y Profetas Ef 2:20 (the church), a conservative evangelical church.
2. Prior to the dispute, the plaintiff, German Bernal, had served as pastor of the church since its inception over thirty (30) years ago in El Salvador.
3. Since immigrating to the United States in 1983 he continued to serve as pastor of the church until retiring in 2005.
4. Pursuant to the plaintiff's retirement the Governing Board and Deacons of the church entered into an agreement with the plaintiff to provide payment of a pension to him pursuant to which he would begin receiving payments upon his retirement and continue to be involved with the church.
5. Mr. Bernal retired in December of 2005 and starting receiving his pension in January of 2006 in compliance with the agreement.
6. In the fall of 2007 a dispute arose whereby the church was divided and litigation ensued. The primary case was resolved in favor of the church faction of which the plaintiff was not a part. The case is still before the Court of Appeals pursuant to a Petition for Rehearing.
7. Upon taking control of the church in July of 2012 and out of what appeared to be pure vindictiveness, the faction took it upon themselves to callously terminate Mr. Bernal's pension, notwithstanding the terms of the agreement which precluded such action.
8. Mr. Bernal is an **elderly** gentleman who depended on his pension. He had no reason to expect the cutoff of his livelihood. As a result of the cutoff of his pension, he is dependent upon his son, Gember Bernal for housing and financial support.

9. Pursuant to the instant lawsuit, Mr. Bernal seeks reinstatement of his pension which is rightfully owed to him.

Summary Judgment Standard

Summary judgment pursuant to Sup. Ct Civ. R. 56 is an extreme remedy which is appropriate only when there are no material facts at issue and when it is clear that the moving party is entitled to judgment as a matter of law. *Maddox v. Bano*, 422 A.2d 763 (D.C. 1980); *Swann v. Waldman*, 465 A.2d 844 (D.C. 1983); *Lamphier v. Washington, Hosp. Center*, 524 A.2d 729 (D.C. 1987). Moreover, all inferences drawn from subsidiary facts are to be resolved against the moving party. *Murphy v. Army Distaff Found., Inc.*, 458 A.2d 61 (D.C. 1983). Conclusory assertions and hearsay in affidavits are not sufficient to establish no genuine factual dispute. *Spellman v. American Sec. Bank*, 504 A.2d 1119 (D.C. 1986). Summary judgment is appropriate only where it is clear what the truth is. *Franklin Inv. Co. v. Huffman*, 393 A.2d 119 (D.C. 1978). Once a movant has made the requisite showing, the issue of material fact required to be present to entitle the opposing party to proceed to trial is not required to be resolved conclusively in favor of the party asserting its existence; rather, all that is required is that sufficient evidence supporting the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial. *Nader v. de Toledano*, 408 A.2d 31 (D.C. 1979), *cert. denied*, 444 U.S. 1078, (1980).

ARGUMENT

I. THE CHURCH MADE AN ENFORCEABLE PROMISE

A. Promissory Estoppel Should be Imposed

1. The promissory estoppel doctrine is well established in the District of Columbia. Liability on theory of promissory estoppel requires evidence of a promise; promise must reasonably induce reliance upon it, and promise must be relied upon to detriment of promisee. *Wallace v. Eckert, Seamans, Cherin & Mellott, LLC*, 57 A.3d 943 (D.C., 2012); *Kauffman v. International Brotherhood of Teamsters*, 950 A.2d 44 (D.C., 2008); *Simard v. Resolution Trust Corp.*, 639 A.2d 540, 552 (D.C.1994); *D. C. Area Community Council, Inc. v. Jackson*, D.C.App., 385 A.2d 185, 188 n. 1 (1978); *Tauber v. Jacobson*, D.C.App., 293 A.2d 861, 867 (1972); *Solway Decorating Co. v. Merando, Inc.*, D.C.App., 240 A.2d 361, 362 (1968); *196 *N. Litterio & Co. v. Glassman Construction Co.*, 115 U.S.App.D.C 335, 338, 319 F.2d 736, 739 (1963); Accord, *Granfield v. Catholic University of America*, 174 U.S.App.D.C 183, 188, 530 F.2d 1035, 1040, Cert. denied, 429 U.S. 821, 97 S.Ct. 68, 50 L.Ed.2d 81 (1976).

2. Promissory estoppel is recognized in the law of the District of Columbia as a theory allowing recovery in contract when there may have been a failure of proof of certain elements necessary to the formation of an express contract (usually those of manifested mutual assent or consideration) if a refusal to enforce a promise admittedly made would in the circumstances (usually reliance) result in injustice. *Federal Ins. Co. v. Thomas W. Perry, Inc.*, 634 F.Supp. 349 (D.D.C., 1986); See *Bender v. The Design Store*. 404 A.2d 194, 195-96 (D.C. 1979); see also Restatement (Second) of Contracts, § 90 (1981); Williston, Contracts, § 140 (3rd ed. 1957).

B. Elements of Promissory Estoppel

3. All of the necessary elements of promissory estoppel are present in the instant case. First, there is clear evidence of a promise by the church Board of Iglesia Evangelica Apostoles Y Profetas Ef 2:20 (the church). There is a written document which indicates in pertinent part, in plain English that
In consideration of pastor German Bernal's hears of service to and on behalf of the Evangelical Church Apostles & Prophets Eph. 2:20 (hereinafter "The Church"), upon his impending retirement the Board of Ministers (hereinafter "The board") herein directs as follows:

When he retires, whether by his own choice or by mutual agreement, the Board of Ministers of the Church agrees to pay a pension to Pastor Bernal in the amount of \$1,000 monthly (hereinafter “the pension”).

4. Secondly, based upon the clear and simple language of the pension document, I came to understand and believe that I would receive a pension upon my retirement. I had never before had any reason or basis to believe that the Board would not keep its stated agreement to pay the pension. I readily came to rely upon anticipated payment of the pension.

5. When the new church Board took over in July of 2012, Mr. Bernal was taken aback at the decision to discontinue the pension. [Affidavit]. I had come to rely on the pension for my livelihood. As a result of the discontinuance of the pension, I became dependent upon my son Gember Bernal for a place to stay and for financial support. [Affidavit]. He feels that he has lost his independence and frequently feels depressed with his present circumstances at this late stage of my life. [Affidavit]. He feel that an illegal injustice has been perpetrated on him. [Affidavit].

6. Thus, it is very clear that the facts in the instant case presents a textbook case for the imposition of promissory estoppel. There is a clear, written promise to pay a pension. It is the type of agreement which would induce reliance upon one who has been granted the pension. And the failure to pay the pension, as promised and agreed, has had a detrimental impact on Mr. Bernal's ability to live a dignified and independent life in hie **elderly** years.

II. THE PENSION AGREEMENT WAS AN ENFORCEABLE CONTRACT

7. In the instant case there are alternative ways in which the agreement between the plaintiff and the defendant can be sustained as an enforceable contract. [Super.Ct.Civ. R. 8\(a\)](#) (relief in the alternative or of several different types may be demanded). In order to fully understand the alternative arguments in support of the contractual basis for the subject pension, it is first of all necessary to understand certain concepts and legal precepts. This case involves, for instance, the concept of a unilateral contract, as opposed to a bilateral contract in addition to different concepts of legally sufficient consideration.

A. Unilateral Contracts

8. As a threshold matter, the pension contract in the instant case can be considered a unilateral contract. In a “unilateral contract,” the promisor makes his promise in exchange for a proposed act and, so long as that act remains unperformed, the promisor is not bound. [King v. Industrial Bank of Washington](#), 474 A.2d 151, 156 (D.C., 1984); [City Stores Co. v. Ammerman](#), 266 F.Supp. 766 (D.C.D.C. 1967) (A unilateral contract is created when the service requested by the offeror is performed by the actor). In a “unilateral contract,” the act which the offer seeks is the consideration for the promise; performance of the act constitutes acceptance of the offer and, at that point, a contract comes into being¹. [King](#), at 156.

9. Thus, in the instant case, the plaintiff's retirement and his agreement to remain involved with the church were arguably “the acts which the offer sought” and, as a result, were legally sufficient consideration. *Id.* The pension agreement specifically provided and the promise made by the church was “[w]hen he retires, whether by his own choice or by mutual agreement, the Board of Ministers of the Church agrees to pay a pension to Pastor Bernal...” [Exhibit No. 1]. Moreover, it is important to understand that “[a] unilateral contract has only one promisor, not two”. [City Stores](#), at 772. It cannot be disputed that the church made a definite and specific promise as part of this contract.

B. The Pension was in Consideration of Plaintiff's Retirement and Continued Association with the Church

10. One can, alternatively, consider the contract as a bilateral contract in which both parties make mutual promises. The subject contract could thus be construed as a promise by the defendant to pay plaintiff's pension and a promise by the plaintiff to retire, but continue his involvement with and service to the church.

11. In the part of the agreement titled “Memorandum of Agreement” the parties state that

[u]pon his retirement, Pastor German Bernal and the Church may agree to his continue service on behalf of the Church as deemed to be appropriate and necessary upon mutually-agreed terms and conditions by the parties.

12. Clearly, the agreement contemplated mutual effort and collaboration beyond his retirement. Thus, it must be understood that just because appreciation of Mr. Bernal's prior efforts before retirement are appreciated, it does not mean that that is the only aspect of the agreement. Defendant, of course, has only focused on the mention of Mr. Bernal's “years of prior service” as if that is the only possible consideration involved in the agreement.

C. Promise as Contract

13. The [Restatement \(Second\) of Contracts § 1](#) defines a contract as “a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty.”

14. The [Restatement \(Second\) of Contracts § 90](#) further provides that

A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.

15. The [Restatement \(Second\) of Contracts § 90](#) Comments points out most importantly that “[a] promise binding under this section is a contract, and full-scale enforcement by normal remedies is often appropriate.” (emphasis added).

D. Reliance is also a Form of Consideration

16. The Court of Appeals has also pointed out that justifiable reliance is considered to be a modern substitute for consideration in contract law. *Hackney v. Morelite Const.*, 418 A.2d 1062 (D.C., 1980), citing *D.C. Area Community Council Inc. v. Jackson*, 385 A.2d 185, 188 n.1 (D.C.App. 1978); 1 Williston on Contracts §100 at 369 (3d ed. 1960); 1 [Restatement of Contracts § 90](#) (1932).

17. As a result, plaintiff has this alternative basis whereby the pension agreement can legitimately be considered a contract.

III. DEFENDANT FAILS TO PRESENT ANY VALID DEFENSES

18. Defendant fails to present any valid defenses that any legal (or factual) validity. There are no legal defenses present for the principle claims in the case relating to promissory estoppel and breach of contract. His statements, in large part, are conclusory and designed to put the plaintiff in a bad light. As a result, at this time, plaintiff will present abbreviated responses.

19. Defendant's idea of the church's assets being held in trust apparently means that the church Board cannot enter into contracts or agreements which require that payments be made. This notion is, obviously absurd and also counter to what is explicitly allowed by the By-Laws. See Statement of Material Facts Not in Dispute.

20. The Board had full authority, pursuant to the By-Laws to provide for a pension. See Statement of Material Facts Not in Dispute. Defendant would have the Court believe that the Governing Board of an organization is some sort of ceremonial legal eunuch, without any authority to make contracts, pay bill from church resources, etc. This is preposterous on its face.

21. Defendant's statement that the Board was controlled by the plaintiff is conclusory and devoid of any factual basis or proof. As a result, there is no basis for consideration of such statements in deciding a motion for summary judgment.

22. The previous case referenced by the defendant, *Hernandez v. Bernal*, 2008 CA 000173 B, is totally irrelevant on many levels. Discussion of the case is essentially designed to distract from the present case. First, that case is in the process of being reheard (and reassessed) by the Court of Appeals. Defendant is, essentially, counting his chickens before they're completely hatched. It is anticipated that the previous decision will be reversed, thus the significant amount of time that the Court has taken in responding to the petition for rehearing².

23. Secondly, the Board that agreed to the pension had nothing to do with the *Hernandez* case. They are, nonetheless, mentioned as if there is a relation. This is just another example of stuff strewn about purely designed to mislead. It should, nonetheless, be noted that key individuals who are now claiming that Mr. Bernal was so bad are some of the very same individuals who signed the pension agreement (e.g. German Hernandez, Julio Flores).

24. Thirdly, contrary to the defendant's claim, *the Judgment in the case is not in the name of the church*³. The Judgment was specifically entered in the names of the *individual* defendants, including German Hernandez. This fact is not in dispute.

25. The defendant cannot cite to a single incident where Mr. Bernal personally engaged in fraud or self-dealing as is alleged by defendant. It is just an example of sweeping a decent man up into this sordid vortex and not caring who's reputation is besmirched in the process⁴.

26. As argued, supra, there was consideration in the form of Mr. Bernal's agreement to continue his involvement with the church after his retirement, which he did. See the Memorandum of Agreement which states that "[u]pon his retirement, Pastor German Bernal and the Church may agree this continue service on behalf of the Church as deemed to be appropriate and necessary upon mutually-agreed terms and conditions by the parties."

27. Neither Mr. Bernal nor anyone else attempted to convey the church property to Gember Bernal or anyone else, for that matter. What was done was, again, with the approval of the Board as part of what was necessary to obtain a loan. This is also undisputed⁵.

28. Finally, for defendant to suggest that Mr. Bernal has suffered no damages is beyond absurd and does not require a response.

CONCLUSION

This case should not have to go to trial. It would truly be an unfortunate expenditure of judicial resources. Moreover, a key thing to note in the instant case is that there are alternative ways in which to find that the promise made by the defendants is legally enforceable either pursuant to promissory estoppel or contract theory. The instant case is a very clear example of a promise made by an organization and later broken. All of the elements of promissory estoppel are clearly established. The fact that the defendant would perpetrate such a callous maneuver on the plaintiff in the twilight of his years is heartbreaking. Moreover, there is a legal basis for the determination that the agreement was a valid contract. There is, in fact, consideration in the form of agreement on the part of the plaintiff to retire and continue his association with the church, which he did. As a result, plaintiff should be granted the relief requested.

WHEREFORE, Plaintiff prays that his motion be granted.

Respectfully submitted,

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Footnotes

- 1 The essence of a unilateral contract is that neither party is bound until the promisee accepts the offer by performing the proposed act (i.e. retirement). Mutuality of obligation is merely another name for the requirement of consideration in bilateral contracts. *Clausen & Sons, Inc. v. Theo. Hamm Brewing Co.*, 395 F.2d 388, 389 (8th Cir.1968); see *Miami Coca-Cola Bottling Co. v. Orange Crush Co.*, 291 F. 102 (S.D.Fla.1923), aff'd, 296 F. 693 (5th Cir.1924); Williston, *supra*, § 105A; *Restatement, supra*, § 79. The term has no application to unilateral contracts. Williston, *supra*, § 13; *Restatement, supra*, § 79, comment f; see Williston, *supra*, § 105A, at 80 (Supp.1983) (correcting error in main volume).
- 2 The Petition for Rehearing was filed on October 4, 2013 and is yet to be resolved.
- 3 Th defendant blatantly (and falsely) claims that “[t]he Court entered a judgment in favor of the Church for \$336,000”. [Answer, p.2, ¶ 9]. This is just another example of defendant's penchant for misrepresenting the facts and easily causing confusion among those who are not familiar with the facts.
- 4 Indeed, as at trial, it is sufficient enough for the defendant to declare and condemn if one literally just walks into a meeting with certain individuals. It is sad to say but such tactics are reminiscent of those used during the McCarthy era.
- 5 Defendant is aware of these things but, nonetheless, as was done throughout the trial, throws out just enough of an allegation to misrepresent, besmirch and confuse.

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